Supreme Court, U.S.
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No. 09-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EDDIE CARDINE AND MICHAEL CURRY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the retrial of a defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury.

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINION BELOW

The Supreme Court of Kentucky's opinion is reported as *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009). Petitioner's Appendix ("App.") 1a–25a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky rendered the judgment from which relief is sought on January 22, 2009. App. at 1a. Petitioner timely filed a petition for rehearing on February 11, 2009, which was denied on June 25, 2009. App. at 26a-27a. Petitioner sought, and was granted, a two week extension in which to file this petition, up to and including October 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

STATEMENT OF THE CASE

1. The Respondents, Eddie Cardine and Michael Curry, were charged with complicity to murder, two

counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree. The charges arose from a confrontation between Cardine and Curry and four men. As a result of the confrontation, one man was killed and two others injured.

At the first trial, a jury was selected and sworn. That jury was then excused from the courtroom while the parties argued pretrial motions. It was during these pretrial arguments that the Commonwealth informed the court that it had discovered a new witness. This new witness, Mr. Hebert, had previously been unknown to the Commonwealth and was only discovered after the jury had been sworn. Hebert was important to the Commonwealth, since he was the only disinterested person who could place a gun in Curry's hand. Defense counsel objected to admitting Hebert's testimony, arguments ensued, defense counsel interviewed Hebert, and Hebert was sworn to reappear. The jury, having now been given a lunch break, was not in the courtroom during any of these activities.

After the break, with the knowledge that the issue would require further discussion, the trial court dismissed the jurors for the day and requested they return the next morning. All remaining arguments regarding the course of action in this case took place outside the presence of the jurors, who remained sworn but were not in the courthouse at the time.

Defense counsel eventually requested that the court exclude the new witness or, in the alternative, allow a continuance. The Commonwealth argued that although a continuance might be appropriate, exclusion of the witness was not:

> *Counsel for Curry*: [I]f the court overrules my motion, excluding the witness Mr. Hebert, then I move for a continuance of a new trial date, so that we have time to investigate and ensure that our defense theory, may or may not change, based on the evidence that was – at least the information that came from Mr. Hebert today. So that I move the court for a continuance if the court doesn't grant my motion to exclude Mr. Hebert at this time.
>
> *Counsel for Cardine*: I would object to a, I think I heard some discussion, I don't think it was on record about a short continuance. I would object to that, I would either like to exclude that evidence or continue it for a further trial date with a significant period of time.

In response to the arguments, the judge ruled that the testimony was admissible and not a discovery violation. Nonetheless, the judge ordered a mistrial, explicitly in response to defense counsel's assertion that a short continuance would provide insufficient time to prepare. Defense counsel did not object, but participated fully in setting a new trial date and requesting bond relief. In reference to the period of time necessary to prepare for the newly discovered witness, the parties stated:

> *Judge:* I don't know how much time you are seeking, from the defense standpoint, as far as time you need to get ready. Do you have any idea?

Counsel for Curry: Just next available trial date.

Judge: Well next available trial date is next year, so, and still may be next year, but I don't know, for example, how quickly that you are looking at your schedule to allow.

Following this discussion, there was a conversation regarding everyone's calendars while the court tried to reschedule the case. Defense counsel then requested bond relief:

Counsel for Cardine: Your Honor, in light of the continuance we are now getting it would also be my motion for bond relief on behalf of Eddie Cardine.

After the parties discussed bond relief for both defendants, they went to the judge's office to get a new trial date. The next morning, the jury was called back to court and released from service.

2. In the second trial, Respondents were both found guilty and sentenced to thirty years. Although neither one raised the issue in the trial court, on appeal Cardine argued that the second trial had violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Commonwealth responded that the defendant had consented to the court's *sua sponte* order by his actions both before and after the judge announced her intent to declare a mistrial. Curry did not raise the double jeopardy claim on appeal, but the Kentucky Supreme

Court nevertheless treated the two defendants alike for purposes of the double jeopardy claim.

By a 4-2 vote, the Kentucky Supreme Court reversed the convictions on the ground that they violated the federal Double Jeopardy Clause. The court first found no manifest necessity justified the mistrial declaration because there had been no violation of discovery rules and Hebert's testimony was merely cumulative and therefore not necessary. After finding no manifest necessity, the court turned its attention to whether the defendants consented to a mistrial.

The Commonwealth had argued that the defendants' failure to object, both before and after the lower court announced its intention to declare a mistrial, was proof of the defendants' consent thereto. The court, however, flatly stated that "the defense does not have to object to a mistrial." App. 19a. The court reasoned that a party does not need to object when it has no opportunity to do so, but it did not take into account that the defense actively participated in scheduling a new trial and sought bond relief before the jury was discharged. Indeed, as soon the word mistrial was spoken by the judge, the Kentucky Supreme Court decided "the time for argument was over and the Appellant simply could not have waived his opportunity to object when he was never given such an opportunity." App. 20a (quoting *Radford v. Lovelace*, 212 S.W.3d 72, 77 (Ky. 2006)) (internal quotation marks and brackets omitted).

The court also explained:

> [I]t simply does not make sense to require a criminal defendant to object to a mistrial. If the

> trial judge improperly grants a mistrial, as in this case, such a rule would require the defense attorney to risk forgoing a win for his client if the objection was sustained. Forcing the defense to risk snatching defeat from certain victory is impermissible in light of the adversarial nature of our justice system and the ethical requirements of zealous competent advocacy.

The court concluded that "[i]t is the Commonwealth whose interests are harmed by an improper, *sua sponte* mistrial."and therefore the Commonwealth's duty to object. App. 21a.

The Commonwealth sought rehearing of the Kentucky Supreme Court's opinion, which was denied on June 25, 2009. App. 26-27.

REASONS FOR GRANTING THE WRIT

This Court has long held that a defendant's right not to be placed twice in jeopardy is not violated when he is retried following a mistrial based on manifest necessity. *United States v. Perez*, 22 U.S. 579, 580 (1824). When a mistrial is declared absent manifest necessity, the general rule is that the Double Jeopardy Clause bars a retrial of the defendant. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). A major exception to that rule, however, is when a defendant consents to the court's declaration of a mistrial. If a defendant so consents, he may be retried regardless of whether there was manifest necessity for the mistrial. *United States v. Dinitz*, 424 U.S. 600, 607-610 (1976).

At issue in this case is whether a defendant consents to a mistrial by failing to object after the trial court *sua sponte* declares one. Most courts have held that a defendant has the opportunity to object until the jury is discharged, and his failure to do so constitutes consent. The Kentucky Supreme Court, by contrast, held that a defendant, as a matter of law, has no opportunity to object following a *sua sponte* mistrial, and that failure to object before the jury is discharged may not be deemed consent. Indeed, the Kentucky Supreme Court went further and reasoned that it is defense counsel's responsibility to a client — *not* to object, thereby "preserving" the violation of the defendant's constitutional right. Certiorari should be granted to resolve this conflict among the courts and because the Kentucky Supreme Court's decision cannot be reconciled with this Court's decisions regarding the nature of double jeopardy rights and the obligation of defendants to assert contemporaneous objections to trial court decisions that violate their constitutional rights.

A. The Kentucky Supreme Court's Decision Conflicts With Decisions Of Numerous Federal Courts Of Appeal And State Supreme Courts

In *Gori v. United States*, 367 U.S. 364, 365 n.6 (1961), this Court expressly left open the question whether a defendant's failure to object to a mistrial may bar a later claim of double jeopardy. *Id.* at 365, n.6. In the absence of a ruling by this Court, the lower courts have reached conflicting results on the question

presented. This absence has allowed for divergent outcomes, depending upon the jurisdiction in which the case is heard. Only this Court can establish a uniform rule on these constitutional issues.

In this case, the jury was not present when the trial court declared a mistrial, and would not return until the following morning. Defense counsel therefore had ample opportunity to object to the court's declaration. The Kentucky Supreme Court nonetheless reasoned that counsel had no obligation or opportunity to object to preserve a later double jeopardy claim. The New Hampshire Supreme Court and the Florida Court of Appeals have likewise held that a defendant's failure to object following the *sua sponte* declaration of a mistrial does not amount to consent. See *State v. Bertrand*, 587 A.2d 1219, 1225 (N.H. 1991) ("a defendant generally cannot consent to a mistrial by silence"); *Joseph v. State*, 988 So. 2d 133, 135 (Fl. App. Ct. 2008) ("A defendant's silence or failure to object to an illegal discharge of a jury does not constitute consent to a declaration of mistrial and it does not waive a defendant's constitutional protection against double jeopardy"). By contrast, numerous federal courts of appeal and state supreme courts have reached the opposite conclusion.

1. The First and Seventh Circuits have held that a defendant does have the opportunity to object following a court's *sua sponte* mistrial declaration and that failure to object constitutes consent. For example, in *United States v. DiPietro*, 936 F.2d 6 (1st Cir. 1991), the defendant requested a curative instruction in response to statements made in the government's closing argument. The trial court agreed to give the curative

instruction, but later became concerned about the nature of the objectionable statements. As a result, the court *sua sponte* declared a mistrial and excused the jury. In finding the defendant consented to the mistrial, the First Circuit reasoned that even if defense counsel had not expected the mistrial, there was ample opportunity to object when the mistrial was declared:

> For several minutes after the decision was announced, she and the government counsel and the trial judge remained in the courtroom. She listened to the court's record explanation of the reason for a mistrial and did not object. She formulated and stated a motion for judgment of acquittal and did not object to the mistrial. Finally, she consulted her calendar and discussed with the court and government counsel acceptable dates for a new trial, and scheduled the trial.

Id. at 11. Although the jury had been released, the First Circuit reasoned that upon defense counsel's immediate objection, the jury could have been asked to remain while the judge reconsidered his order. The court of appeals found defense counsel's actions to be tantamount to consent.

The Seventh Circuit applied the same approach in *Camden v. Circuit Court of Second Judicial Circuit, Crawford County, Ill.*, 892 F.2d 610 (7th Cir. 1989), *cert. denied*, 495 U.S. 921 (1990). In that case, the trial court *sua sponte* declared a mistrial in the presence of the jury. Before discharging the jury, the court made clear that there would be a second trial. The Seventh

Circuit held that the defendant impliedly consented to the mistrial by failing to object to the mistrial or retrial, and instead remained silent. The court of appeals reached that conclusion even though (in contrast to the instant case) the defendant had a very limited opportunity to object.

> Here, the opportunity to salvage Camden's trial by objecting to the mistrial declaration terminated upon the dismissal of the jury. Nonetheless, defense counsel's active assistance in arranging Camden's retrial and his failure to object on the record even after the mistrial declaration and dispersal of the jury provide strong evidence that his silence during the mistrial declaration constituted agreement that a mistrial was necessary.

Id. at 616, n.7.

Although not directly addressing the timing of the objection, the Fourth and Eleventh Circuits apply a similarly strict standard: if the opportunity to object exists in any manner, and a defendant fails to do so, he or she is deemed to have consented. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995), *cert. denied*, 516 U.S. 986 (1995); *United States v. Puelo*, 817 F.2d 702 (11th Cir. 1987), *cert. denied*, 484 U.S. 978 (1987). Massachusetts also applies this strict standard. See, e.g., *Pellegrine v. Commonwealth*, 844 N.E.2d 608 (Mass. 2006).

Another group of courts, the Second, Fifth, and Sixth Circuits, apply a "totality of the circumstances" test to determine whether a defendant consented when

he failed to object following a *sua sponte* mistrial. *See* *Maula v. Freckleton*, 972 F.2d 27 (2nd Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) (totality of the circumstances); *United States v. Nichols*, 977 F.2d 972 (5th Cir. 1992) *cert. denied*, 510 U.S. 833 (1993), (implied consent by failing to object and scheduling new trial date); *United States v. Gantley*, 172 F.3d 422 (6th Cir. 1999) (failure to object following *sua sponte* mistrial declaration was positive indication of implied consent to the mistrial where counsel had the opportunity to speak to the judge before the jury returned to be discharged). Missouri follows this approach. See *State v. Tolliver*, 839 S.W.2d 296 (Mo. 1992) (no objection during bench conference before judge went back on record to dismiss the jury).

The Third Circuit looks to specific factors that illustrate consent. *Love v. Morton*, 112 F.3d 131 (1997) (no opportunity to object, and therefore no consent to mistrial, where judge immediately left the bench after the declaration).

Finally, the Ninth Circuit implies consent to a mistrial "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." *United States v. You*, 382 F.3d 958, 964-65 (9th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005) (quoting *Weston v. Kernon*, 50 F.3d 633 (9th Cir. 1995), *cert. denied*, 516 U.S. 937 (1995)).

What is consistent among all these courts is that they require a defendant to object to a *sua sponte* mistrial declaration in order to assert a later double jeopardy claim unless circumstances exist which would explain a failure to object. The instant case would have been decided differently in all of those courts.

Moreover, the holdings of those courts reflect a profound disagreement with the Kentucky Supreme Court's assertion that "it simply does not make sense to require a criminal defendant to object to a mistrial." because to object might be to forego a future "win" on double jeopardy grounds. App. 20-21a. In each of the cases cited above, the federal court of appeals held that defense counsel was obligated to object to a mistrial if the judge was present and the jury not yet discharged. These courts did not view such an objection as "snatching defeat from certain victory," but rather as properly attempting to preserve a defendant's right to have his case heard by his first jury.

2. In concluding that defense counsel lacked the opportunity to object to the court's mistrial declaration, the Kentucky Supreme Court confused the trial court's announcement that it intended to declare a mistrial with the mistrial itself, i.e., the actual discharge of the jury. Other courts have specifically recognized that the oral announcement of mistrial is not the mistrial itself, and that the case remains open until the jury has actually been discharged. See, *e.g.*, *United States v. Razmilovic*, 507 F.3d 130, 14142 (2nd Cir. 2007); *Creighton v. Hall*, 310 F.3d 221, 228 (1st Cir. 2002), *cert denied*, 538 U.S. 933 (2003); *Camden v. Circuit Court*, 892 F.2d 610, 616 n.7 (7th Cir.1989), *cert. denied*, 495 U.S. 921 (1990); *United States v. Smith*, 621 F.2d 350, 352 n.2 (9th Cir.1980). And the federal and state appellate decisions discussed above impliedly recognize that the case remains open until the jury has actually been discharged.

Had the Kentucky Supreme Court analyzed this case using any of the standards regarding implied consent applied in the federal circuits, the court would have upheld the convictions. Certainly there was ample time for the defense to express its position on mistrial. The parties were in the courtroom for several minutes after the court declared the mistrial. The jury was not present for the declaration or for any of the discussion regarding the mistrial. Although time was available, and although the judge herself had pointed out that the jury had been sworn, instead of objecting to what the Kentucky Supreme Court called an "abrupt declaration," defense counsel engaged in discussions about a convenient trial date and whether the court would reduce bond before the new trial. Until the appeal of the convictions from the second trial, no Kentucky court was aware of any objection to the trial court's order. The absence of any objection in those circumstances would have been deemed consent in the federal circuits and state supreme courts addressed above.

Whether, and under what circumstances, to imply consent from silence are issues which have not been settled by this Court. The Kentucky Supreme Court's opinion is a prime example of how each jurisdiction has been free to develop its own standard. Whether a right under the Constitution has been waived should not be dependent upon the jurisdiction in which the case is heard. Jurisdiction should not determine application of the Constitution. Free of many of the factual complications apparent in other implied consent cases, the Kentucky opinion represents a case which would permit this Court to provide the simple

pronouncements regarding consent and waiver which are necessary in order to ensure uniform application of the Constitution and orderly administration of justice.

B. The Kentucky Supreme Court's Decision Is Contrary To This Court's Precedent Holding That Double Jeopardy Protection Belongs To The Defendant.

The Kentucky Supreme Court failed to understand the nature of the right which may be waived and the harm which occurs from twice being placed in jeopardy. The logic of looking to the defendant's actions for consent after a court makes an oral declaration of mistrial flows from the right protected and the time at which the right can no longer be vindicated. The harm is the loss of the first tribunal. As this Court has repeatedly stated, a trial which ends in a mistrial denies a defendant the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Once the jury is released, the ability to get the case resolved by that particular tribunal is forever lost, but it is not lost until then. By holding that a defendant need not and may not object to a *sua sponte* mistrial declaration after it is announced but before the jury is discharged, the Kentucky Supreme Court created an arbitrary and illogical end point to the protection of the right to trial by the first tribunal.

The double jeopardy guarantees of the Fifth Amendment involve personal rights which may be waived by a defendant. As this Court stated in *United*

States v. Dinitz, the important consideration, for purposes of the Double Jeopardy Clause, "is that the defendant retain primary control over the course to be followed." 424 U.S. 600, 607-08. Nothing in the record of this case, or the Kentucky Supreme Court's description of it, remotely suggests that the defendants had lost the ability to control the course to be followed by the court. Nowhere does the record suggest that the judge prevented the defendants from voicing opposition to a mistrial, or that there was insufficient time to do so before the release of the jury.

Rather than place the responsibility upon the defendant to press his right to proceed with the jury, the Kentucky court removed all control from the defendant by stating that "it simply does not make sense to require a criminal defendant to object to a mistrial." Such reasoning encourages defendants to stand silent in the face of improper action by a trial court, even though that action takes away their right to have their case heard by the first tribunal. See *United States v. Jorn*, 400 U.S. 470, 484 (1970) (explaining that a *sua sponte* mistrial deprives the defendant of his option to go to the first jury and perhaps end the dispute then and there with an acquittal); *Arizona v. Washington*, 434 U.S. at 497, 503-04 (1978) (having to stand trial a second time can increase the "financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted").

The Kentucky Supreme Court instead held that defendants should stand silent and await an ultimate

victory after having twice stood trial, been convicted, and had the case reversed on appeal. This Court has long discouraged such gamesmanship on the part of defendants. See, *e.g.*, *New York v. Hill*, 528 U.S. 110, 118 (2000) (a rule that defendants do not waive by silence their right to a trial within the time period required by the Interstate Agreement on Detainers "would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting later on. . . . In light of its potential for abuse and given the harsh remedy of dismissal with prejudice we decline to adopt it."); *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (A party may not engage in "sandbagging" by "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later . . . claim[] that the course followed was reversible error."); *United States v. Tateo*, 377 U.S. 463, 468 fn.4 (1964) ("That any judicial system should encourage litigants to raise objections at the earliest rather than the latest possible time seems self-evident.").

The Kentucky Supreme Court's decision not only relieves defendants of the responsibility of pursuing their rights, but converts the Fifth Amendment protection, intended to shield defendants from successive prosecutions, into a sword which defendants may wield to purposely conceal their position concerning a mistrial. That court compounded its error by stating that "[i]t is the Commonwealth whose interests are harmed by an improper *sua sponte* mistrial." App. __a. This unprecedented approach to waiver and consent places the burden on the

government to object to any trial error that impairs a defendant's rights, because the error may lead to a reversal of a conviction, and a reversal is contrary to the government's interests. Such a "game theory" approach to trials runs contrary to our system of criminal justice, where each side is expected to object at trial to errors that impair their rights.

In the final analysis, the defendant is the only party who knows whether he desires the court's action or prefers to proceed with the initial tribunal. By requiring the Commonwealth to assert the defendant's rights and decide whether to object to a *sua sponte* mistrial, the Kentucky Supreme Court has removed the defendant from this process. That holding is contrary to this Court's precedent which places the defendant in control of his or her own case.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of *certiorari*.

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APPENDIX

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SUPREME COURT OF KENTUCKY
2006–SC–000677–MR
2006–SC–000680–MR

EDDIE CARDINE AND MICHAEL CURRY — APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NOS. 04–CR001803–001 AND NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE NOBLE

REVERSING

When Appellants Eddie Cardine and Michael Curry first went to trial, the trial court declared a mistrial soon after the jury was sworn. After a second joint jury trial, the Appellants were both found guilty of murder, attempted murder, and assault in the second degree, and were sentenced to thirty years' imprisonment. On appeal, both Appellants raise a number of issues, though only one need be addressed. Because the second jury trial in this case violated the Fifth Amendment's proscription against double jeopardy, Appellants' convictions are reversed.

I. Background

Appellants Cardine and Curry were both indicted on June 22, 2004 in a five-count indictment charging them with complicity to murder, two counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree.

After a previous confrontation between the Appellants and Deonte Neal, Tyson Gibbs, Otha Burney, and Dejuan Smith, the Appellants picked up a third person and met the other group for a second time. It was at this second meeting that a gunfight ensued, resulting in the death of Gibbs and injury of Neal and Burney, allegedly from shots fired by the Appellants.

As became apparent from the testimony at the second trial, it was undisputed that Cardine fired a gun. Curry, however, disputed having a gun, which would have been an issue at the first trial.

At the first jury trial, both parties made numerous pretrial motions before and after the jury was selected and sworn. The last matter brought to the court's attention by the Commonwealth was a newly discovered witness, a man who claimed Curry tried to sell a gun to him on the day of the shooting. Even though the Commonwealth conceded that it had other witnesses that would testify that Curry had a gun on the day of the shooting, it argued that this new witness was more disinterested than the others (despite the fact that he was discovered by the mother of one of the victims). Defense counsel objected that this witness's testimony was evidence of other bad acts under KRE

404(b) and should be excluded because the KRE 404(c) notice requirements were not met. As both sides made their arguments about this witness's admissibility to the judge, he was located, brought in the courtroom, and sworn to reappear. The witness then left the courtroom and the court took a break for lunch. After lunch, the parties argued over whether the new witness should be allowed to testify.

Each Appellant's defense counsel moved to exclude the new witness, or in the alternative, for a continuance. The Commonwealth claimed the witness was crucial. It should be noted that the Commonwealth's description of the testimony given by this "crucial witness" at the eventual second jury trial is limited to one sentence in its brief. The Commonwealth argued in favor of allowing the new witness to testify and stated that it preferred a continuance to exclusion.

The trial judge denied defense counsels' motions to exclude the witness. Immediately thereafter, the trial judge determined that the witness was an important factor in obtaining a fair trial and *sua sponte* declared a mistrial "pursuant to manifest necessity." Neither the defense nor the Commonwealth objected.

After the second jury trial in this case, Appellants were both convicted and sentenced to thirty years in prison. Their appeals to this Court, therefore, are a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Cardine and Double Jeopardy

Appellant Cardine's first claim of error is that the second trial violated his double jeopardy rights under

Section 13 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. For the reasons discussed herein, this Court agrees.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V; see also Ky. Const. § 13 ("No person shall, for the same offense, be twice put in jeopardy. . . ."). The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Further, the Fifth Amendment and Section 13 of the Kentucky Constitution are "identical in the import of their prohibition against double jeopardy." *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky.1985).

There is some confusion under Kentucky law about when jeopardy attaches. The current federal rule is clear: in jury trials, jeopardy attaches when the jury is impaneled and sworn. *Crist v Bretz*, 437 U.S. 28, 36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Before the enactment of the Kentucky Penal Code, the rule for attachment of double jeopardy was the same as the current federal rule. *Baker v. Commonwealth*, 280 Ky. 165, 132 S.W.2d 766, 767 (1939) ("[J]eopardy attaches when the jury is impaneled and sworn."). However, in 1975, the General Assembly enacted KRS 505.030(4), which states that jeopardy attaches "after the first witness [i]s sworn. . . ."

According to the official commentary to the Penal

Code, the drafters intentionally changed the point at which jeopardy attaches to make it the same in both bench and jury trials. The official commentary to KRS 505.030(4) provides,

> The provision provided in subsection (4) is a codification of prior law, except for a slight change in the point at which jeopardy attaches. Previously, in a jury case, jeopardy attached when the jury was impaneled and sworn. The change that is made by subsection (4) serves only to create the same rule for jury and nonjury trials.

KRS 505.030(4) cmt. (citation omitted).

This Court heard a challenge to the constitutionality of KRS 505.030(4) soon after its enactment. *See Graham v. Commonwealth*, 562 S.W.2d 625, 626 (Ky.1978). In *Graham*, this Court noted that the U.S. Supreme Court had recently granted a writ of certiorari to the Ninth Circuit regarding its decision in *Bretz v. Crist*, 546 F.2d 1336 (9th Cir.1976), a case that expressly addressed the issue of when jeopardy attaches in a jury trial. The Ninth Circuit had recently ruled as a matter of constitutional law that jeopardy attached in a jury trial when the jury was sworn. *Id.* at 1343. Rather than waiting for the U.S. Supreme Court to rule on the issue, this Court issued its opinion in *Graham*, rejecting the approach employed by the Ninth Circuit and upholding the constitutionality of KRS 505.030(4). *Graham*, 562 S.W.2d at 627. This Court acknowledged that the new statute was subject to further challenge if the United States Supreme Court held that such a double jeopardy

attachment rule did not comport with the U.S. Constitution. *Id.* at 627 ("If the U.S. Supreme Court holds otherwise as a matter of federal constitutional law we will, of course, respectfully conform to its decision. . . .")

The U.S. Supreme Court issued its opinion in *Crist* four months later. The Court, in analyzing the Montana statute at issue, framed the issue as "whether the federal rule governing the time when jeopardy attaches in a jury trial is binding on Montana through the Fourteenth Amendment. The federal rule is that jeopardy attaches when the jury is empaneled and sworn; a Montana statute provides that jeopardy does not attach until the first witness is sworn." *Crist*, 437 U.S. at 29, 98 S.Ct. 2156.

As an initial matter, the U.S. Supreme Court noted:

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. . . . It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Id. at 35-36, 98 S.Ct. 2156 (footnotes omitted). Applying this rationale to the statute at issue in *Crist*-a statute with a double jeopardy attachment provision identical to Kentucky's statute-the U.S. Supreme Court concluded that

> the federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns-the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury-have combined to produce the federal law that in a jury trial jeopardy attached when the jury is empaneled and sworn. . . . [Therefore,] the time when jeopardy attaches in a jury trial "serves as the lynchpin for all double jeopardy jurisprudence."

Id. at 37-38, 98 S.Ct. 2156 (quoting *Bretz*, 546 F.2d at 1343). Thus, under the Double Jeopardy Clause, as applied to the states through the Fourteenth Amendment, the U.S. Supreme Court explicitly held that "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy" and it is binding on the states. *Id.* at 38, 98 S.Ct. 2156. Thus, "Montana's view as to when jeopardy attaches is impermissible under the Fourteenth Amendment. . . ." *Id.* at 37, 98 S.Ct. 2156.

Therefore, statutes like Kentucky's that fix the point for attachment of jeopardy in jury trials as the swearing of the first witness are unconstitutional. KRS 505.030(4), enacted before the U.S. Supreme Court's

decision in *Crist*, is in direct conflict with its interpretation of the federal double jeopardy clause. Unfortunately, despite the promise in *Graham* that the issue could be raised again, Kentucky's statute fixing jeopardy attachment at the swearing of the first witness has remained untouched for over thirty years. *E.g.*, *Graham*, 562 S.W.2d at 627; *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky.1976); *Radford v. Lovelace*, 212 S.W.3d 72, 79 (Ky.2006); *Commonwealth v. Lewis*, 548 S.W.2d 509, 510, n. 2 (Ky.1977). Even though several of our cases have cited *Crist* for the rule that jeopardy attaches in a jury trial when the jury is sworn, none have directly addressed its impact on KRS 505.030(4). E.g., *Couch v. Maricle*, 998 S.W.2d 469, 470 (Ky.1999); *Commonwealth v. Lamberson*, 201 S.W.3d 497, 499 (Ky.App.2006).

The direct conflict between the statute and the federal constitution is at issue in this case because the jury, but no witnesses, had been sworn in the first trial. Jeopardy had not attached under KRS 505.030(4), but it did attach under Crist. Therefore, this case requires us to definitively resolve this area of confusion in Kentucky law. Ultimately, the United States Supreme Court's interpretation of the federal constitution, as the supreme law of the land, trumps any competing interpretation by this Court and any inconsistent statute passed by this Commonwealth's General Assembly. Thus, to the extent that KRS 505.030(4) and the cases interpreting it guarantee anything less than the federal standard for attachment of double jeopardy, they are overruled.

In the present case, the jury was sworn and jeopardy therefore attached on October 25, 2005, the day before

the discovery of the new witness.

Attachment of jeopardy alone, however, does not resolve this case. While the protection afforded by the Double Jeopardy Clause is extraordinary, it is not without exception. "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial or 2) the defendant either requests or consents to a mistrial." *Ray*, 982 S.W.2d at 673; *United States v. Dinitz*, 424 U.S. 600, 606-07, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) ("Since Mr. Justice Story's 1824 opinion for the Court in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165, this Court has held that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether 'there is a manifest necessity for the (mistrial), or the ends of public justice would otherwise be defeated.' " (quoting *Illinois v. Somerville*, 410 U.S. 458, 461, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973))). As discussed below, in this case, there was no basis for the trial court's finding of a manifest necessity and the Appellants' attorneys neither requested nor consented to a mistrial.

Broadly speaking, "[w]hether to grant a mistrial is within the sound discretion of the trial court, and 'such a ruling will not be disturbed absent . . . an abuse of that discretion.' " *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky.2005) (quoting *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky.2004)). However, "[a] mistrial is an extreme remedy and should be resorted to only when there appears in the record a

manifest necessity for such an action or an urgent or real necessity." *Id.* "[T]he trial judge, in making a mistrial decision, must use 'sound discretion' in declaring a mistrial because a constitutionally protected interest is inevitably affected." *Radford*, 212 S.W.3d at 79 (Ky.2006) (quoting *Grimes v. McAnulty*, 957 S.W.2d 223, 225 (Ky.1997)). And "[a]lthough a trial court is vested with discretion on granting a mistrial, the power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious causes." *Commonwealth v. Scott*, 12 S.W.3d 682, 685 (Ky.2000) (citing *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir.1991)). Simply put, "[t]he error must be 'of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].'" *Bray*, 177 S.W.3d at 752 (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky.1996)) (emphasis added).

"[W]hen a mistrial is declared at the behest of the prosecutor or on the court's own motion, . . . the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him, [is balanced] against the public interest in insuring that justice is meted out to offenders." *Malinovsky v. Court of Common Pleas of Lorain County*, 7 F.3d 1263, 1270-71 (6th Cir.1993) (internal quotation marks and citations omitted). When the trial court *sua sponte* declares a mistrial, "the Double Jeopardy Clause is not offended and a retrial is not prohibited if there existed a manifest necessity for declaring a mistrial." Id. at 1270; *see also Arizona v. Washington*, 434 U.S. 497,

505-06, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *Glover*, 950 F.2d at 1242; *United States v. White*, 914 F.2d 747, 754 (6th Cir.1990); *Hamm v. Jabe*, 706 F.2d 765, 767 (6th Cir.1983); *United States v. Bridewell*, 664 F.2d 1050, 1051 (6th Cir.1981). Thus, if there was not a manifest necessity in this case, double jeopardy barred the second trial of Cardine.

A manifest necessity is an " 'urgent or real necessity'" that is "determined on a case by case basis." *Scott*, 12 S.W.3d at 684 (quoting *Miller v. Commonwealth*, 925 S.W.2d 449, 453 (Ky.1996)). A hung jury is a classic example of a manifest necessity requiring a mistrial. *Id.; see also Grimes v. McAnulty*, 957 S.W.2d 223, 224 (Ky.1997) (manifest necessity for a mistrial "found to exist when the defendant introduces improper evidence which prejudices the Commonwealth's right to a fair trial").

However, "[i]n some cases the declaration of a mistrial by a presiding judge when there was no manifest necessity to do so will prevent retrial.' " *Radford*, 212 S.W.3d at 79 (quoting *Nichols v. Commonwealth*, 657 S.W.2d 932, 933 (Ky.1983)); *see also Macklin v. Ryan*, 672 S.W.2d 60 (Ky.1984) (no manifest necessity for a mistrial where "juror who knew the mother of the co-defendant stated that she did not discuss the matter with the other jurors"); *Scott*, 12 S.W.3d at 683, 685 (no manifest necessity for mistrial where prosecutor almost handed loaded BB gun to juror, juror pointed out to prosecutor that he "know[s] enough about guns to check it and make sure it's empty before you start passing them around" and Commonwealth objected that the juror was hostile); *Leibson v. Taylor*, 721 S.W.2d 690, 693 (Ky.1986),

overruled on other grounds by *Shaffer v. Morgan*, 815 S.W.2d 402 (Ky.1991) (no manifest necessity for a mistrial where defendant improperly influenced brother's refusal to testify at his trial when brother has constitutional right to refuse to testify by asserting privilege against self-incrimination); *Miller v. Commonwealth*, 925 S.W.2d 449, 453 (Ky.1996), overruled on other grounds by *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky.2001) (no manifest necessity for a mistrial where child victim in sexual abuse and kidnapping case broke into tears on witness stand, had to leave courtroom, and those in courtroom could still hear her exclaiming "I don't want to. I don't want to." before returning to the stand). Therefore, when determining whether the trial court abused its discretion in declaring a mistrial, "it is necessary to examine whether there was manifest necessity to do so, since a mistrial-where no manifest necessity exists-triggers a person's constitutional protection against double jeopardy." *Radford*, 212 S.W.3d at 80. As in *Radford*, whether the trial court abused its discretion is the core issue in this case.

"When deciding whether there is manifest necessity to declare a mistrial, we must look to see if either parties' right to a fair trial has been infringed upon." *Id.* To do this, "the court must always assess if the parties' 'interest in seeing the first trial through to a verdict [is] outweighed by competing and equally legitimate demand for [protection of the parties' rights and] public justice.' " *Id.* (quoting *Scott*, 12 S.W.3d at 685). Specifically, "the decision should be based on whether the complained of 'event . . . prevented the [party] from receiving a fundamentally fair trial.' " *Id.*

(quoting *Scott*, 12 S.W.3d at 685).

In this case, on the morning of trial and after a jury had been selected and sworn, the Commonwealth disclosed to the court and opposing counsel that it had a newly discovered witness-a man who it knew only as "Rob" and to whom it had never spoken-who would testify that Curry tried to sell him a gun on the day of the shooting. However, in addition to Cardine pointing the finger at Curry, the Commonwealth already had two witnesses who planned to testify (and who did so at the second jury trial in this case) that they had made earlier statements to police that Curry shot at them.

The Commonwealth had nearly sixteen months to prepare its case after the court ordered discovery until the jury was sworn on October 25, 2005. When the Commonwealth showed up on October 25 and picked a jury, it was ready to present its case with the evidence it had. By proceeding and completing jury selection, the Commonwealth tacitly acknowledged that it had enough evidence to proceed to trial. Therefore, the witness, whom neither side knew about before the jury was sworn, could not have been essential and had to be cumulative. Otherwise, the Commonwealth would have asked for a continuance before the jury was selected and sworn. Cardine's appellate counsel correctly argues that the Commonwealth's need to put on this newly discovered witness paled in comparison to a defendant's "valued right to have his trial completed by a particular tribunal," which is the "right that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn." *Crist*, 437 U.S. at 36, 98 S.Ct. 2156 (internal quotation marks omitted).

Thus, the Commonwealth's argument against double jeopardy is based on a claim that this witness was essential. Defense counsel, however, argued that the witness was merely an attempt to get in testimony about prior bad acts under KRE 404(b) without complying with KRE 404(c)'s notice requirements.[1] Under KRE 404(c) if the Commonwealth fails to provide the required notice, the trial judge has only the option to exclude the evidence or grant a continuance. Assuming 404(b) applies, the trial court's decision to grant a mistrial on its own motion was not a manifest necessity, because both exclusion and a continuance were possible alternative remedies. Even if it does not, those remedies are far less invasive to the Appellant's double jeopardy rights than granting a mistrial, and the trial court was mandated to use these remedies unless there was a manifest necessity to declare a mistrial.

> [1] KRE 404(c) requires "reasonable pretrial notice to the defendant of [the prosecution's] intention to offer such evidence." If the prosecution fails to provide the required notice, the court may either exclude the evidence or "for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

Also, Appellant argued as grounds for exclusion or a continuance that Criminal Rules 7.24 and 7.26 were violated by the late disclosure of this witness. Despite Appellant's claim, however, these rules do not require

disclosure of prosecutorial witnesses.[2] Actually, the fact that these rules were not violated cuts against the need for a mistrial since no remedy, much less one as extreme as a mistrial, was required under these Criminal Rules absent a discovery violation.

> [2] In addition, neither the local rules of the Jefferson Circuit Court nor the trial judge's discovery order required disclosure.

Even if this newly discovered witness was material, there would still not be a basis for a mistrial based on manifest necessity. In *Downum v. United States*, 372 U.S. 734, 735-38, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), a sworn jury was discharged after the prosecutor failed to assure the presence of a witness that was "essential" for two of the six counts against the defendant. The U.S. Supreme Court found that the witness would have only strengthened the case against the defendant and it held there was not a manifest necessity for a mistrial; thus a retrial was prohibited. *Id.* at 737-38, 83 S.Ct. 1033; *see also* 8 Leslie W. Abramson, *Kentucky Practice: Criminal Practice and Procedure* § 14:10 (4th ed.2003) (retrial prohibited where "mistrial allows prosecutor to strengthen case against defendant"). This case is on all fours with the present case, applies federal double jeopardy rules, and is binding on this Court.

In *Mizell v. Attorney General of State of New York*, 586 F.2d 942 (2d Cir.1978), two witnesses for the prosecution did not show up for the beginning of a trial, even though it was likely at least one of them would be able to make it by the following Monday. On Thursday, the prosecutor asked for a continuance until the

following Monday, but the trial judge discharged the jury instead. The Second Circuit Court of Appeals held that "[u]nder these circumstances neither the 'ends of public justice' nor 'manifest necessity' required a mistrial. A continuance should have been granted." *Id.* at 947. In much the same way that the trial court in this case considered its crowded calendar, in *Mizell*, "[t]he only reason given by the court for the failure to grant a continuance was the convenience of the jury." *Id.* The court's reasoning that another case was scheduled to begin the next day, while a very real problem for the trial court, cannot supersede this Appellant's double jeopardy rights, and does not create a manifest necessity for a mistrial.

As in *Radford*, the Commonwealth in this case did not make a motion for a mistrial but the trial court nonetheless declared one on its own motion after jeopardy had attached. *Radford*, 212 S.W.3d at 83. The facts of *Radford* dealt with uncoercive contact between the defendant's relative and witnesses in the case, and this Court held that double jeopardy barred a retrial because such uncoercive contact did not rise to the level of manifest necessity required for a mistrial. *Id.*

Similar to *Radford*, a trial court's *sua sponte* declaration of a mistrial pursuant to manifest necessity is unnecessary when the Commonwealth offers late-discovered cumulative evidence. In this case, the relative weight of the Commonwealth's late-discovered witness merited only his exclusion or a continuance.

Instead of granting a continuance, the trial court informed the parties that it had another upcoming lengthy criminal trial and that its next available trial date was months down the road. However, this alone

should have given the court pause about declaring a mistrial, because the delay in getting another date only underscores the Appellant's right to be tried by the jury he had. It was within the trial court's discretion to exclude this witness without undue prejudice to the Commonwealth if it did not want to grant a continuance. Having these viable options precludes a finding of manifest necessity, and it was thus an abuse of discretion to grant the mistrial.

B. Curry

Curry has not raised the double jeopardy issue in his brief, even though he was tried with Cardine and his counsel lodged the same objections to the new witness at trial. Therefore, any double jeopardy error in his conviction must be addressed under the palpable error rule, which states that "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26 (emphasis added). As this Court has repeatedly held, double jeopardy claims fall under the palpable error rule because this Court "do[es] not want to let stand a conviction possibly tainted by double jeopardy." *Terry v. Commonwealth*, 253 S.W.3d 466, 470 (Ky.2007); *see also Brooks v. Commonwealth*, 217 S.W.3d 219, 222 (Ky.2007). This is basic palpable error review, where an unpreserved error requires reversal "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different

result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky.2006). Clearly, allowing this case to proceed to trial a second time caused a completely different outcome: conviction instead of release. Thus, the double jeopardy analysis above applies equally to Appellant Curry, making his conviction equally in violation of his constitutional rights.

C. Waiver and Preservation of Error

In response to Cardine's brief, the Commonwealth argues that the double jeopardy violation was somehow waived or otherwise not preserved for appeal because the Appellants got what they requested (albeit in the form of a mistrial), did not object to the mistrial, and did not raise the issue when the trial court was setting a date for the second trial. Because these arguments are also applicable to Curry, they are addressed as to both Appellants.

First, neither Appellant asked for a mistrial.[3] Appellants requested the alternative relief described above: exclusion of the new witness or continuance to another date. A mistrial is not a substitute for a continuance, which the Commonwealth seems to imply, because it excuses the current jury from the case, whereas a continuance postpones the trial but keeps the same jury. Thus, for double jeopardy purposes, only the latter remedy is workable, since only it preserves the "valued right to have [a] trial completed by a particular tribunal," which is the "right that lies at the foundation of the federal rule that jeopardy attaches

when the jury is empaneled and sworn." *Crist*, 437 U.S. at 36, 98 S.Ct. 2156 (internal quotation marks omitted).

> [3] If Appellants had asked for a mistrial, they could have waived their Double Jeopardy claim. *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) ("[I]n the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause."). *See also Derry v. Commonwealth*, 274 S.W.3d 439 (Ky.2008).

Second, the defense does not have to object to a mistrial. In *Radford*, retrial of the defendant was barred on double jeopardy grounds even though the defendant did not object to the trial court's declaration of a mistrial. *Radford*, 212 S.W.3d at 83; *see also United States v. Gantley*, 172 F.3d 422, 429 (6th Cir.1999) ("[A] defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent." (emphasis added)). In *Radford*, this Court noted that "[a]ccording to the record, the first mention by the trial court of a mistrial was from the bench when the trial court dismissed the jury. Therefore, there is no argument that the Appellant consented to the mistrial because the record does not provide any evidence that a mistrial was even discussed, or moved for by the Commonwealth, before

the trial court dismissed the jury." *Radford*, 212 S.W.3d at 76-77. This Court also noted,

> Furthermore, RCr 9.22 states that if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party. This rule is almost identical to Federal Rule of Criminal Procedure 51(b), which provides, in part, that if a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. Therefore, when "the very first time there was mention of [a mistrial was] when the court [declared a mistrial,] [i]t was clear . . . that the time for argument was over [and the Appellant] simply could not [have] waive[d] [his] opportunity to object when [he] was never given such an opportunity."

Id. at 77 (quoting *United States v. Breeding*, 109 F.3d 308, 310 (6th Cir.1997)) (alterations in original). Since the Appellants in this case also failed to object to the trial court's abrupt *sua sponte* declaration of a mistrial, *Radford* controls. Therefore, as in *Radford*, the Appellants in this case did not consent to the trial court's declaration of a mistrial, nor were they required to object.

Additionally, it simply does not make sense to require a criminal defendant to object to a mistrial. If the trial judge improperly grants a mistrial, as in this case, such a rule would require the defense attorney to risk forgoing a win for his client if the objection was

sustained. Forcing the defense to risk snatching defeat from certain victory is impermissible in light of the adversarial nature of our justice system and the ethical requirements of zealous, competent advocacy. This notion is buttressed by the fact that the burden of proof is on the Commonwealth. KRS 500.070(1); *Brock v. Commonwealth*, 947 S.W.2d 24, 26 (Ky.1997). It is the Commonwealth whose interests are harmed by an improper, *sua sponte* mistrial. When the trial court ordered, *sua sponte*, a mistrial after the jury was sworn under an erroneous finding of manifest necessity, the Commonwealth could have objected to provide the court with a chance to correct its error and to allow the Commonwealth a chance to later prove its case. No such objection was made by the Commonwealth.

Third, even though neither Appellant raised the issue of double jeopardy at the time of their retrial, as noted above double jeopardy violations can be addressed as palpable error because the nature of such errors is to create manifest injustice. Presentation of such errors to the trial court, while perhaps preferable, is not required. In *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky.1977), overruled on other grounds by *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky.2008), this Court heard a double jeopardy claim even though it was not raised at trial. Even though the defendant "did not present th[e] issue of double jeopardy or multiple prosecution to the trial court . . . [this Court was] persuaded that failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand." *Id.* This principle has been repeatedly affirmed: "[U]nder our longstanding rule, double jeopardy questions may be

reviewed on appeal, even if they were not presented to the trial court." *Terry*, 253 S.W.3d at 470; *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky.2003); *Grundy v. Commonwealth*, 25 S.W.3d 76, 85 (Ky.2000); *Butts v. Commonwealth*, 953 S.W.2d 943, 945 (Ky.1997); *Gunter v. Commonwealth*, 576 S.W.2d 518, 522 (Ky.1978); *see also Menna v. New York*, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (double jeopardy claim on appeal not waived by defendant's guilty plea). This Court "remain[s] committed . . . to our procedural holding in *Sherley* that failure to preserve double jeopardy issues 'should not result in permitting a double jeopardy conviction to stand.'" *Dixon*, 263 S.W.3d at 593 n. 50, (quoting *Sherley*, 558 S.W.2d at 618).

Ultimately, because the Appellants did not request or cause the mistrial, their double jeopardy rights remained intact. They requested appropriate relief when they sought exclusion or a continuance. The fact that the trial court *sua sponte* and unnecessarily declared a mistrial cannot prejudice or extinguish their double jeopardy rights. Thus, the Appellants adequately preserved the issue by their alternative motions for exclusion or a continuance, and they were not required to object to the declaration of a mistrial.

III. Conclusion

In conclusion, jeopardy attached before the trial court abused its discretion in finding a manifest necessity and *sua sponte* declaring a mistrial at the first jury trial of Cardine and Curry. Therefore, their second jury trial violated Section 13 of the Kentucky

Constitution and the Double Jeopardy Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. For that reason, their convictions and the judgments of the Jefferson Circuit Court are reversed, and these actions shall be dismissed.

MINTON, C.J.; SCHRODER and VENTERS, JJ., join. CUNNINGHAM, J., dissents by separate opinion with SCOTT, J., joining. ABRAMSON, J., not sitting.

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SUPREME COURT OF KENTUCKY
2006–SC–000677–MR
2006–SC–000680–MR

EDDIE CARDINE AND MICHAEL CURRY — APPELLANTS

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NOS. 04–CR001803–001 AND NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE CUNNINGHAM

I respectfully dissent from the well-written opinion of Justice Noble.

By the entering of the mistrial, Appellants received the continuance each requested. The trial court was faced with the option of not allowing the Commonwealth to call a last minute witness or the option of granting a continuance. The Commonwealth insisted that the newly discovered witness was critical because he was a disinterested third party and the only person, other than the victims of the shooting, who could put a gun in the hands of Curry. The Commonwealth argued that the witness was crucial and the ends of justice required that he be allowed to testify. According to the brief of Appellant, Cardine, even the trial court thought the witness was important to both the defense

and the prosecution. Both defense counsels argued for exclusion, or in the alternative, a continuance. The trial court instructed the attorneys to talk to the witness to see if the matter could be resolved. The matter could not be resolved, and the court was faced with having to either exclude the critical evidence or continue the trial. The court was then advised by at least one defense counsel that a twenty-four hour continuance would not be sufficient.

In addition to jeopardizing other cases that were on the docket, as well as having a sworn jury out on recess for several days, the court decided that a mistrial was the best solution. Other judges may have handled the situation differently. But under the difficult circumstances, this trial judge did what she thought protected the interests of both parties. Her actions were reasonable, and the trial court did not abuse its discretion in finding manifest necessity and declaring a mistrial. The ancient protection against twice being placed in jeopardy of a criminal prosecution is intended to protect the abuse of individuals from arbitrary power of the state. It was never intended to be a gratuity to criminal defendants when the judiciary, in good faith, blunders.

SCOTT, J., joins this dissenting opinion.

SUPREME COURT OF KENTUCKY
2006–SC–000677–MR

EDDIE CARDINE APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 04–CR001803–001

COMMONWEALTH OF KENTUCKY APPELLEE

AND

2006–SC–000680–MR

MICHAEL CURRY APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing filed by the Appellee, of the Memorandum Opinion, rendered January 22, 2009, is DENIED.

Minton, C.J.; Cunningham, Noble, Schroeder,

Scott and Venters,J.J., concur. Abramson, J., not sitting.

ENTERED: June 25, 2009.

/S/ JOHN D. MINTON
CHIEF JUSTICE